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In The

Supreme Court of the United States

October Term, 1989

DALE ROBERT YATES,

Petitioner,

v.

PARKER EVATT, Commissioner, South Carolina Department of Corrections, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF FOR PETITIONER

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QUESTION PRESENTED

WHETHER THE BURDEN-SHIFTING JURY INSTRUCTIONS GIVEN AT PETITIONER'S TRIAL CONSTITUTED HARMLESS ERROR UNDER *ROSE v. CLARK*?

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CITATION TO OPINIONS BELOW

The revised majority opinion of the Supreme Court of South Carolina denying Dale Yates' petition for a writ of habeas corpus on the most recent remand from the United States Supreme Court is reported as *Yates v. Aiken*, ___S.C.___, 391 S.E.2d 530 (1989), and is reprinted at J.A. 147-152. The January 29, 1990 order of the South Carolina Supreme Court denying rehearing is unreported, and is reprinted at J.A. 146. The original opinion of the South Carolina Supreme Court, later revised on denial of petition for rehearing, is unreported and is reprinted at J.A. 135-145. This Court's previous opinion reversing the judgment of the South Carolina Supreme Court is reported as *Yates v. Aiken*, 484 U.S. 211 (1988), and is reprinted at J.A. 128-134. The prior opinion of the South Carolina Supreme Court following summary reversal by this Court is reported as *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). J.A. 118-127. This Court's first decision granting the petition for writ of certiorari and remanding to the South Carolina Supreme Court is reported as *Yates v. Aiken*, 474 U.S. 896 (1985). J.A. 117. The initial *per curiam* order of the South Carolina Supreme Court dated May 23, 1985 denying Yates' petition for habeas corpus is unreported, and is reprinted at J.A. 116. The opinion of the South Carolina Supreme Court affirming Yates' convictions and death sentence on direct appeal is reported as *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert. denied*, 462 U.S. 1122 (1983). J.A. 99-115.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(A), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

The judgment of the South Carolina Supreme Court on remand from the United States Supreme Court was entered on February 6, 1989. A timely petition for rehearing was denied on January 29, 1990. On April 20, 1990, the Chief Justice of the United States, acting in his capacity as Circuit Justice for the Fourth Circuit, entered an order extending the time for filing the petition for writ of certiorari to and including May 29, 1990. The petition was filed on May 29, 1990, and was granted on October 1, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . . "

2. This case also involves S.C. Code §16-3-10 (1976), which provides:

> *"Murder"* is the killing of any person with malice aforethought, either express or implied.

STATEMENT OF THE CASE

When this case was last here, the Court summarized the facts as follows:

> Petitioner and an accomplice robbed a country store in South Carolina in 1981. After petitioner left the store a fight occurred in which the accomplice and the storekeeper's mother were both killed. . . .
>
> At his trial, petitioner testified that the decedent had not even entered the store before he left and that he had not intended to kill or to harm anyone. The jury, however, was instructed "that malice is implied or presumed from the use of a deadly weapon". . . . [On collateral review] the state [supreme] court determined that the jury instruction at petitioner's trial "suffered from the same infirmities [. . .] addressed in *Francis v. Franklin*." [*Yates v. Aiken*,] 290 S.C. 231, 234, 349 S.E.2d 84, 85 (1986).

Yates v. Aiken, 484 U.S. 211, 212-213 (1988). On remand from this Court, however, the state court refused to grant relief, asserting that the constitutional defects in the jury instructions were not retroactively cognizable. *Yates v. Aiken*, 290 S.C. 231, 233-235, 349 S.E.2d 84, 85-86 (1986), J.A. 119-122. This Court again granted certiorari and unanimously reversed. *Yates v. Aiken*, 484 U.S. 211 (1988), J.A. 128-134. On this second remand, the state supreme court held that the unconstitutional jury instructions were harmless, and again denied relief, over the dissent of two of the court's five members. *Yates v. Aiken*, ___ S.C. ___, 391 S.E.2d 530 (1989), J.A. 147-158.

The harmless error inquiry before the Court demands a close review of the facts surrounding the armed robbery and homicide, for petitioner's conviction may be upheld

only if the evidence establishes, at a minimum, that the jurors would have found it unnecessary to rely on the unconstitutional presumptions in reaching their verdict. *Rose v. Clark*, 478 U.S. 570 (1986); *Francis v. Franklin*, 471 U.S. 307, 325-326 (1985). Petitioner and his accomplice, Henry Davis, entered the country store armed, respectively, with a pistol and a knife. Davis obtained a large quantity of cash from the storekeeper, Willie Wood, and handed it to petitioner. An altercation ensued during which petitioner fired two shots in Wood's direction. One of the bullets pierced Wood's outstretched hand and came to rest in his shirt pocket after superficially wounding him in the chest. Tr. 792-793; 952-953. Petitioner shouted, "Let's go!" to Davis, ran out of the store, and waited outside in Davis' car. At that moment Wood's mother, Helen Wood, entered the store from an adjoining office. A struggle followed involving Davis, Mrs. Wood and her son during which Mrs. Wood received a stab wound to the chest, and died almost immediately. Meanwhile Willie Wood had pulled out a loaded pistol from his belt and fired five bullets into Davis, killing him.

When Davis failed to emerge from the store after a few seconds, petitioner drove away. J.A. 58. He was arrested a short time later in some nearby woods after a hurried attempt to hide the pistol and money under some leaves. J.A. 82-83. He did not learn of Mrs. Wood's death until police informed him of it after his arrest. Tr. 1268-1270.

Petitioner was indicted for the murder of Helen Wood, as well as for conspiracy, armed robbery, and assault and battery with intent to kill for the shooting of Willie Wood. At trial, Willie Wood's description of the

crime made up the bulk of the state's case. J.A. 16-28. The state also presented the testimony of a third conspirator, David Loftis, who had participated in the initial planning for a robbery along with Davis and petitioner, but who did not accompany them to the Wood store. J.A. 6-16.[1] The state's primary contention in support of the murder charge was that Mrs. Wood's death was the probable result of the armed robbery of the store, and that petitioner's participation in this robbery rendered him vicariously liable for Davis' stabbing of Mrs. Wood under South Carolina state law principles of accomplice liability.

Petitioner testified in his own defense. On the witness stand he insisted that he had never intended Mrs. Wood's death and had not even been aware of her presence in the store. J.A. 42-43, 54, 61, 75, 77-78. Indeed, he and Davis had specifically planned not to harm anyone in the store under any circumstances. Rather, according to petitioner, they had agreed to use their weapons only to induce the storeowner to give them the cash from the till, and then flee the area immediately regardless of whether the storeowner complied. *Id*. As the South Carolina Supreme Court later noted, petitioner testified that "it was his intent all along to abandon the robbery without hurting anyone if the victims refused to cooperate." *State v. Yates*, 280 S.C. 29, 33, 310 S.E.2d 805, 808 (1982). Given this intent, petitioner's counsel argued to the jury, Mrs.

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[1] Loftis' testimony showed that Yates was originally assigned a relatively minor role in the planned armed robbery. According to the plan agreed upon earlier that day, Loftis was to enter the store with the gun, while Davis would drive his car as the getaway vehicle. Loftis testified that Yates' role was "to stay in the car and just watch, my backup or whatever." J.A. 10.

Wood's death was *not* the probable consequence of the planned robbery, and petitioner should not be held vicariously liable for it. J.A. 93.

In describing the events inside the Wood store, petitioner testified that he produced a gun and demanded money. J.A. 54. At the same time, Davis pulled out a knife. Until that moment, petitioner said, he had not been aware that Davis had taken the knife from the car into the store. J.A. 79. Wood placed a quantity of paper money on the counter. Davis picked up the money and handed it to petitioner, who then began backing toward the door. J.A. 55-56. Rather than following petitioner out, as he expected, Davis stayed at the counter and ordered Wood to lean over it. Petitioner assumed that Davis was trying to prevent Wood from reaching for a weapon, and continued to move toward the exit. J.A. 56-57. When petitioner was about two steps from the door, Davis suddenly yelled at him to shoot. Petitioner saw that Wood's hands were down, and thinking Wood was reaching for a gun, he fired two shots. At that moment petitioner heard a female voice calling, "What's going on out there?" Petitioner said, "Let's go!" to Davis, turned, and ran out the door. J.A. 57. Reaching Davis' car, he waited for Davis briefly, and then moved under the wheel and drove off. J.A. 57-58. Petitioner insisted that he never saw Mrs. Wood at any time before, during or after the robbery. J.A. 54, 61.

Willie Wood was the only surviving witness to the events in the store after petitioner fled. According to Wood, Davis moved down the counter, and the two men met at the end of the counter and began struggling. J.A. 18-19. By then Helen Wood had entered the store. She

grabbed Davis, apparently from behind or from the side, and "all three of [them] stumbled around the corner, out in the aisle." J.A. 19. By this time Wood had pulled his pistol from his clothing. As Davis retreated into a row of shoe boxes, still holding his knife but apparently trapped along a wall of the store, Wood emptied his fully-loaded .38 caliber revolver into Davis' body, killing him. J.A. 19-22, 26. Wood then noticed his mother on her hands and knees, bleeding profusely. J.A. 27.

An autopsy revealed that Mrs. Wood had suffered a single stab wound to the heart. J.A. 31-32. The testimony does not disclose the depth of this wound nor any estimate of the force which would likely have been required to inflict it. *Id.* Although the South Carolina Supreme Court would later characterize the homicide as a "multiple stabbing," *Yates v. Aiken*, ___S.C.___, 391 S.E.2d 530, 532 (1989), J.A. 151, the autopsy revealed no additional injuries to Mrs. Wood other than the one stab wound. Significantly, there were no defensive wounds on her hands, nor other evidence of a struggle with her assailant. J.A. 32.[2]

In his closing argument, the prosecutor targeted petitioner's claim that he had not planned to injure anyone during the robbery, and that he had tried to return to this

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[2] Equally unsupported by the record is the state court's repeated assertion that "Davis lunged at Mrs. Wood with his knife." *Yates v. Aiken*, 290 S.C. 231, 236, 349 S.E.2d 84, 87 (1986); *Yates v. Aiken*, ___S.C.___, 391 S.E.2d 530, 531 (1989). Willie Wood's uncontroverted testimony indicated that Mrs. Wood grabbed Davis while he and Mr. Wood were struggling. J.A. 19-20.

plan, despite having shot at Willie Wood, by fleeing the store before Mrs. Wood's arrival. First, the prosecutor stressed that Helen Wood's death was the probable consequence of the common design to commit armed robbery, thus justifying a guilty verdict under accomplice liability principles. In so doing, the prosecutor urged the jury to convict petitioner of murder because "[t]he malice required was in his heart," noting that "[h]e pointed a pistol and pulled the trigger." J.A. 83. In addition, the prosecutor asserted on the basis of circumstantial evidence[3] that petitioner and Davis had actually intended from the outset to kill *any* witnesses to the robbery, including Mrs. Wood. J.A. 85-86.

The trial judge began his charge to the jury with general instructions concerning the function of the jury and the state's burden of proving guilt beyond a reasonable doubt.[4] He then defined the offenses of conspiracy to

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[3] The prosecutor stressed that the robbers did not conceal their identity, and asserted that Davis' use of a knife in the robbery, and his order to Willie Wood to bend over the counter, showed both robbers' pre-existing plan to commit murder without creating any noise or attracting attention. The prosecutor also argued that petitioner and Davis probably saw Mrs. Wood outside the store just before the robbery. J.A. 85-88.

[4] These instructions included the statement that "reasonable doubt really means a substantial doubt for which an honest person seeking the truth can give a real reason." J.A. 95. *See Cage v. Louisiana*, No. 89-7302 (U.S., Nov. 13, 1990) (due process violated by misdefinitions of reasonable doubt as "such a doubt as would give rise to a grave uncertainty," and "actual substantial doubt," together with reference to "moral certainty"), *cf. Taylor v. Kentucky*, 436 U.S. 478, 488 (1978). The

(Continued on following page)

commit armed robbery and armed robbery, stating that "a deadly weapon . . . is any object which can be readily . . . put to use in inflicting personal injury on another person." J.A. 95.

Next, the trial judge defined murder and its constituent element of malice. S.C. Code §16-3-10 (1976). The instruction began with an explanation of the concepts of express and implied malice. J.A. 96. The judge continued, "Malice is implied or presumed by the law from the willful, deliberate, and intentional doing of an unlawful act without any just cause or excuse." J.A. 96. After advising the jury that this presumption of malice was not conclusive but could be rebutted, the trial judge announced a second mandatory rebuttable presumption: "Malice is implied or presumed from the use of a deadly weapon." *Id.* The South Carolina Supreme Court later held both of these instructions unconstitutional under *Francis v. Franklin*, 471 U.S. 307 (1985). J.A. 119, 148-149 n. 3, 151.

Immediately following the malice charges, the trial judge went on to explain South Carolina's law of accomplice liability. These instructions began with the admonition to the jury that the law of accomplice liability was applicable "depending on your view of the facts . . . and the question is whether this law would apply to the facts

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(Continued from previous page)

prosecutor's opening statement at the beginning of petitioner's trial anticipated and emphasized the judge's equation of "reasonable doubt" with "substantial doubt." J.A. 4-5.

as you find them to be." J.A. 97. The instructions continued:

> If two or more parties combine together to commit an unlawful act, and in the commission of that criminal act, a homicide is committed by one of the parties *and the homicide was a probable or natural consequence of the acts done in pursuance of the agreed upon, unlawful act*, all present, participating in the unlawful undertaking, are as guilty as the one who committed the fatal act.

J.A. 97 (emphasis added). The judge stated that an actual agreement to kill was not required to render an accomplice vicariously liable, but, he repeated, such liability did depend on whether "the unlawful common purpose involves the probable contingency of taking a human life. . . . " *Id.* He also instructed the jury that:

> [a] defendant is not responsible for a homicide committed by his co-defendant as an independent act *growing out of some private malice or ill-will* which the slayer had toward the deceased, and which is not in furtherance of or connected with the original unlawful purpose, and that is particularly so where the original common design was of such a nature that a homicide would not be a natural or probable result of that unlawful undertaking.

J.A. 98 (emphasis added).

The judge next explained the law of withdrawal, informing the jury that even where homicide is the natural and probable consequence of a crime, a party to that crime "may escape liability for such homicide if he completely withdraws from the original criminal undertaking, and communicates that withdrawal to his accomplice in sufficient time for the accomplice to have withdrawn

as well." The party's withdrawal from the scene of the crime, while not necessarily sufficient to establish withdrawal, was a circumstance which the jury was entitled to consider in determining whether the defendant had in fact withdrawn from the criminal enterprise. J.A. 98. Finally, the judge defined the offense of assault and battery with intent to kill, explaining that this offense, like murder, required proof of malice. Tr. 1211-1212.[5]

The jury deliberated for 45 minutes before convicting petitioner on all charges, including the murder of Helen Wood. The following day, the trial jury sentenced petitioner to death for Mrs. Wood's murder.[6]

The South Carolina Supreme Court upheld petitioner's convictions and death sentence on direct appeal. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982), *cert.*

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[5] The present habeas corpus petition does not challenge petitioner's conviction for assault and battery upon Willie Wood, nor those for armed robbery and conspiracy. Accordingly, the validity of those convictions is not before the Court.

[6] The jury's sentencing decision was apparently not an easy one. After an hour and 19 minutes of deliberation, the jury returned to the courtroom to inform the trial judge that it was deadlocked on the issue of sentence, and that "the feeling is that neither side was going to change its vote." Tr. 1371-1372. The trial judge refused to accept this declaration of a deadlock and instructed the jury to continue its deliberations. At the same time, he also refused petitioner's request that the jury be informed that its inability to agree on a sentence after reasonable deliberations would result in imposition of a life sentence, S.C. Code §16-3-20(C) (1981 Cum. Supp.), and that a new trial would not be required. Two-and-a-half hours later, the jury returned with a binding recommendation that petitioner be sentenced to death. Tr. 1372-1377.

denied, 462 U.S. 1124 (1983). Shortly after his convictions became final, the state supreme court acknowledged the unconstitutionality of implied malice instructions like those given at petitioner's trial. *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983); *State v. Woods*, 282 S.C. 18, 19-20, 316 S.E.2d 673 (1984). Subsequently, petitioner's case followed a winding procedural path. As this Court recalled in its prior opinion in this case:

> [P]etitioner sought a writ of habeas corpus from the South Carolina Supreme Court, arguing that the burdenshifting instruction given at his trial was unconstitutional under the state court's reasoning in *Elmore* and under our decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). While the application for habeas corpus was pending, we decided another case involving a burdenshifting instruction, *Francis v. Franklin*, 471 U.S. 307 (1985), and petitioner promptly called that decision to the attention of the state supreme court. The court denied the writ without opinion.
>
> Petitioner then sought a writ of certiorari in this Court. We summarily vacated the judgment of the South Carolina Supreme Court and remanded the case "for further consideration in light of *Francis v. Franklin*." *Yates v. Aiken*, 474 U.S. 896 (1985). On remand the state court determined that the jury instruction at petitioner's trial "suffered from the same infirmities present in *Elmore* and addressed in *Francis v. Franklin*." 290 S.C. 231, 233, 349 S.E.2d 84, 85 (1986). Nevertheless, the court held that petitioner was not entitled to relief. As an explanation for its holding, the court stated that its decision in *Elmore* should not be applied retroactively to invalidate a conviction that was final when *Elmore* was decided.

Yates v. Aiken, 484 U.S. 211, 212-213 (1988).

This Court again granted certiorari and unanimously reversed, holding that the state court had erred in denying full retroactive effect to *Francis v. Franklin*. In doing so, the Court stated that when it previously granted certiorari and remanded petitioner's case for reconsideration, *Yates v. Aiken*, 474 U.S. 896 (1985),

> [o]ur mandate contemplated that the [South Carolina Supreme Court] would consider whether, as a matter of constitutional law, petitioner's conviction could stand in the light of *Francis*. Since the state court did not decide that question, we shall do so.

484 U.S. at 215. The Court then proceeded to reverse the South Carolina Supreme Court's judgment denying habeas relief, and ordered the state supreme court "to grant the relief that federal law requires." *Id.*, at 218.

On remand, a three-to-two majority of the South Carolina Supreme Court once again denied relief. First, the state court majority asserted that while it was "constrained to accept the high court's mandate that *Francis v. Franklin* applies here," the state court interpreted this Court's opinion as meaning that "petitioner would not be eligible in federal habeas corpus proceedings to raise the mandatory presumption issue because counsel did not raise this issue under *Sandstrom* on direct appeal in state court." *Yates v. Aiken*, ___S.C.___, 391 S.E.2d 530, 531 n. 3 (1989), J.A. 148 n. 3. Having thus decreed (despite having itself twice decided the merits of petitioner's claim) that petitioner was foreclosed from further review as of right in the federal courts, the state court again denied relief,

this time on the ground that the *Sandstrom* error was harmless. *Id.*, J.A. 149-152.[7]

The state court reiterated that the trial judge's charge included two separate erroneous presumptions of malice. 391 S.E.2d at 532; J.A. 151; *see Yates v. Aiken*, 290 S.C. 231, 233, 349 S.E.2d 84, 85, J.A. 119. However, the court asserted that because the state prosecuted petitioner on a theory of accomplice liability, his own mental state was irrelevant, and the jury was required only to determine whether petitioner's accomplice, Davis, had acted with malice when he fatally stabbed the victim. Concluding that the jury "would have found it unnecessary to rely on either erroneous mandatory presumption in concluding that Davis acted with malice," 391 S.E.2d at 532, J.A. 151-152, the court held the unconstitutional instructions to be harmless.

Justice Toal dissented in an opinion joined by Justice Finney. The dissent expressed doubt that this Court's prior decision authorized the state court to engage in harmless error analysis on remand, and concluded, in any

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[7] The state had previously pressed a harmless-error claim before the South Carolina Supreme Court both when the petition was first presented to that court in early 1985, and again at greater length when this Court first remanded the case for reconsideration in light of *Francis v. Franklin*. Brief of Respondents at 19-21, *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986). On the latter occasion, the state court cited *Rose v. Clark*, 478 U.S. 570 (1986) for the proposition that *Francis* errors could be harmless under some circumstances, *Yates v. Aiken, supra*, 290 S.C. at 234 n. 1, 349 S.E.2d at 86 n. 1, J.A. 121 n. 1, but implicitly declined the state's invitation to decide the question of harmless error.

event, that the errors were not harmless. Justice Toal pointed out that the application of South Carolina's law of accomplice liability to this case was complicated by the fact that petitioner had contended that he had withdrawn, and thereby created a substantial factual question as to whether he could be held accountable for Davis' homicidal act under that theory. The dissent continued:

> Despite the majority's contention that one must look at the intent of the killer, not that of the accomplice, the trial judge failed to articulate that the jury must find the killer acted with malicious intent. Thus, the jury could have mistakenly inferred from the confusing instructions that the intent required in order to prove murder was that of Yates because he carried a gun. The unconstitutional instruction which allowed the jury to presume intent, I believe, would have eclipsed Yates' defense of withdrawal, and prejudiced his right to a fair trial.

Yates v. Aiken, supra, 391 S.E.2d at 535 (Toal, J., dissenting), J.A. 156.

Petitioner moved for rehearing. After nearly a year, a divided state court denied the motion. J.A. 146. Nevertheless, the majority made one substantive change in its opinion. Where the original opinion had stated that "[i]n the context of accomplice liability for murder, the element of malice which must be proved is that of the *killer*," J.A. 139 (emphasis in original), the amended opinion substituted, "On the facts of this case, as charged by the trial judge, the element of malice relied on by the State is that of the killer, Henry Davis." *Yates v. Aiken, supra*, 391 S.E.2d at 532, J.A. at 151. The majority opinion did not quote or cite any portion of the trial judge's charge, or

any other portion of the record, in support of this assertion.

SUMMARY OF ARGUMENT

The state supreme court's most recent denial of relief is based on a series of erroneous assumptions about the evidence, the instructions and the applicable law, and bears little resemblance to the harmless error analysis approved by this Court's decisions. The basis of the state court's harmless error holding was that the malice of the actual killer, Davis, was proven by overwhelming evidence, and that under state law principles of accomplice liability, the jury's finding of Davis' malice sufficed to support Yates' conviction. As an initial matter, assuming that due process permits an assessment of the entire record rather than simply of the strength of the predicate facts in determining the harmlessness of an unconstitutional presumption, *infra* at 18-19, 35-36, the state court erred in its estimation of the strength of the record evidence of Davis' malice. Shorn of the state supreme court's exaggerations, the evidence on this point did not exclude the reasonable possibility that Davis accidently stabbed the victim during his desperate and unsuccessful effort to avoid being shot and killed by her son. Because the evidence of Davis' malice in the killing of Mrs. Wood was circumstantial and by no means conclusive, the jury's verdict might reasonably have been affected by instructions which created mandatory presumptions of malice on the basis of no more than participation in an armed robbery and the use of a deadly weapon. *Infra* at 20-22.

Moreover, even had Davis' malice been proven by overwhelming evidence, the state court erred in its apparent assumption that the jury would have interpreted its instructions as requiring any determination of Davis' mental state. Rather, as noted by the dissenting opinion below, it is much more likely that the jury understood its task to be to determine whether *Yates* acted with malice in connection with the victim's death. *Infra* at 24-26.

This has both legal and factual significance. As a matter of constitutional due process, the strength of the evidence of *Davis'* malice cannot save petitioner's conviction because the jury was never clearly instructed to consider that issue at all. *Bollenbach v. United States*, 326 U.S. 607, 614 (1946); *cf. Pope v. Illinois*, 481 U.S. 497, 502-503 (1987). *Infra* at 32-34. Moreover, once the jury focused on the issue of *Yates'* malice, it would naturally have understood that issue (informed by the unconstitutional instructions) to be intertwined with two closely-related factual determinations concerning Yates' mental state. These are

> (1) whether Yates' intent in agreeing to help rob the Wood store encompassed a probable homicide (an element of accomplice liability under state law), *infra* at 23-29, and
>
> (2) whether Yates had sufficiently withdrawn from the criminal enterprise prior to the killing to free him from liability as an accomplice. *Infra* at 29-30.

Because each of these issues required jury assessments of Yates' intent, and because the most reasonable interpretation of the judge's instructions was to require the jury to

determine whether Yates acted with malice in connection with Mrs. Wood's death, the unconstitutional presumptions of malice likely affected the jury's resolution of both of the factual issues on which Yates' liability as an accomplice depended. Given that the evidence was in conflict on these issues, and that a properly-instructed jury could reasonably have resolved either or both of them in petitioner's favor, the constitutional errors cannot be disregarded as harmless. *Rose v. Clark*, 478 U.S. 570 (1986).

ARGUMENT

The proper standard for evaluating whether a jury charge containing an unconstitutional presumption is harmless is the subject of some debate. See *Carella v. California*, ___U.S.___, 109 S.Ct. 2419, 2421-24 (1989) (Scalia, J. concurring). In *Carella*, four members of the Court noted that *Rose v. Clark*, 478 U.S. 570 (1986), had suggested two different approaches to harmless error analysis in this context. Under one, the inquiry turns on whether the predicate fact was so indicative of the presumed fact that an appellate court could be confident that a jury that had found the former could not help but to have found the latter.[8] Under the second, the inquiry is

[8] This approach would also treat unconstitutional presumptions as harmless where the defendant admits the element's existence at trial, or where the jury acquits the defendant of the charge containing the presumed element. *Carella v. California, supra*, 109 S.Ct. at 2423 (1989); *Connecticut v. Johnson*, 460 U.S. 73, 87 (1983) (plurality opinion).

somewhat broader, asking "whether the evidence was so dispositive of [the element] that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." *Id.*, 109 S.Ct. at 2424; *see also, Pope v. Illinois*, 481 U.S. 497, 503 & n.6 (1987) (question is whether it is "clear that if the jury had never heard the impermissible instruction its verdict would be the same"). Even under this second approach, which allows a reviewing court greater license to reevaluate the entire factual record, respondent cannot possibly carry its burden of demonstrating that the constitutional error in this case was harmless. *Chapman v. California*, 386 U.S. 18 (1967).

In concluding that the illegal instruction was harmless, the South Carolina Supreme Court reasoned that under the state law of accomplice liability, the only "malice" that the jury was required to find was that of the actual killer, Davis. Apparently believing that the evidence of his malice was overwhelming, the court concluded that the jury would have "found it unnecessary to rely on the erroneous presumption" to convict petitioner of murder. J.A. 151.

That conclusion was erroneous for several reasons. To begin with, even under the legal framework posited by the court below, the evidence of Davis' malice was hardly so clear as to permit a reviewing court to find *beyond a reasonable doubt* that the jury "would have found it unnecessary to rely on the presumption." *Rose v. Clark, supra*, 478 U.S. at 583. Moreover, a reasonable juror would have interpreted the instructions as requiring an assessment of Yates' "malice." *See Sandstrom v. Montana*, 442 U.S. 510, 515-517 (1979). Because Yates' state of mind was

an essential element required for conviction under a theory of accomplice liability, and because the evidence of his malice was highly equivocal, the error was not harmless regardless of the strength of the evidence pertaining to Davis. Finally, because there is no way of knowing whether the jury convicted Yates on the basis of an assessment of his malice as opposed to that of Davis, the error is prejudicial as a matter of law. *Bollenbach v. United States*, 326 U.S. 607, 614 (1946).

A. The Evidence of Davis' Malice Was Not So Overwhelming as to Remove the Effect of the Burden-shifting Presumptions

Even if the only issue in this case were whether the evidence establishes Davis' malice beyond a reasonable doubt, the judgment below would have to be reversed. Independent of the presumption, the evidence pertaining to Davis' state of mind was as follows: Willie Wood, the only surviving witness to his mother's death, testified that she entered the store from an adjoining office just as Davis and Mr. Wood began to scuffle. J.A. 17, 19, 25-26. Mr. Wood testified that his mother grabbed Davis, possibly from behind, and was fatally stabbed in the ensuing three-way struggle. *Id.* The autopsy revealed that Mrs. Wood had been stabbed only once. J.A. 31-32.[9] On the

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[9] This actual scarcity of evidence may explain the state court's tendency to exaggerate and misrepresent the record. While the prosecution's uncontroverted eyewitness and autopsy evidence established that Mrs. Wood was stabbed only

(Continued on following page)

basis of these facts, the jury could well have concluded that Davis had not intended to kill Mrs. Wood, but had done so inadvertently in the course of the struggle.[10] In this connection, the evidence strongly suggested that Davis already knew that Mr. Wood had a gun, thus providing the jury with an additional reason to doubt that Davis had acted out of malice, but to suspect instead that he might have inadvertently stabbed Mrs. Wood while flailing about in a panicky (and unsuccessful) effort to avoid being shot and killed by her son.

To be sure, on this record, the jury *could have* found the evidence that Davis acted with malice to be sufficient. *Cf. Jackson v. Virginia*, 443 U.S. 307 (1979). That, however, is not the relevant inquiry. At the very least, the evidence of Davis' malice is sufficiently ambiguous to prevent a

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once in the course of the struggle that she deliberately joined, the court asserted that she suffered a "multiple stabbing" when "Davis lunged at [her] with his knife." *Compare* J.A. 19, 25-26, 31-32, *with* 123, 150-151. The state court's embroidery may have bolstered its own conclusion that Davis acted in malice, but it cannot cure the record's real deficiencies on this element.

[10] The presence or absence of malice distinguishes murder and manslaughter under South Carolina law. S.C. Code §§16-3-10, -50 (1985). Involuntary manslaughter requires criminal negligence, defined as "the reckless disregard of the safety of others." S.C. Code §16-3-60 (1985). A killing can constitute involuntary manslaughter rather than murder even if it is committed with a deadly weapon during a robbery, so long as it is unintentional. *See State v. Thompson*, 278 S.C. 1, 7, 292 S.E.2d 581, 585, *cert. denied*, 456 U.S. 938 (1982). Nor does the fact that a homicide was committed with a knife exclude the possibility that the slayer did not intend to kill. *State v. Gorey*, 235 S.C. 301, 111 S.E.2d 560 (1959).

reviewing court from concluding beyond a reasonable doubt that "if the jury had never heard the impermissible instruction its verdict would have been the same." *Pope v. Illinois, supra,* 481 U.S. at 503 n. 6.

B. Regardless of the Strength of the Evidence Pertaining to Davis' Malice, the Presumptions, in the Context of Instructions Which Directed the Jury to Focus on Yates' State of Mind, Were Highly Prejudicial.

In any event, even were the Court to conclude that the evidence demonstrates beyond a reasonable doubt that Davis had the requisite malice, the erroneous instructions would still have been highly prejudicial. To say the least, as pointed out by the dissenting justices below, the jury charge was "confusing." J.A. 156. In fact, it is far from clear that the jury would have understood the charge to have required an assessment of Davis' malice at all. *See infra* at 24-27. But even if that were a possible interpretation of the instructions, it is equally if not more likely that a reasonable juror would have interpreted the charge as requiring an assessment of Yates' state of mind – i.e., whether he independently had the requisite malice. *Id.*

By directing the jury to focus on Yates' malice, the charge could have made, and probably did make, a difference in the outcome of the case in one of several ways. Because Yates was indisputably not the actual killer, a murder conviction could only be premised on a theory of accomplice liability. In order to be convicted on that theory, however, the jury would have to conclude: (1) that the homicide was either an actual part of the robbery

scheme or its natural and probable consequence, *and* (2) that Yates had not withdrawn from the scheme by the time that Davis actually stabbed Mrs. Wood. In both respects, as is explained in the sections below, the trial judge's direction to focus on Yates' malice was crucial to the jury's deliberations. Moreover, because the State's evidence was equivocal on both points, it is impossible to conclude "beyond a reasonable doubt" that the outcome was not affected by the impermissible presumptions.

1. By Directing the Jury to Presume Yates' Malice, the Instructions Prejudiced Petitioner by Relieving the Prosecution of its Burden to Prove the Threshold Element of the Offense – that Homicide Was An Intended or Probable Consequence of the Plan to Rob the Store.

Yates' principal contention at trial was that, although he and Davis had planned to rob the Woods' store, Mrs. Wood's murder was neither within the express terms of the plan nor a natural and probable consequence of it – the threshold element of the offense of murder on a theory of accomplice liability.[11] By directing the jury to presume Yates' malice from proof of certain predicate facts – i.e., that he possessed a gun, and that he had engaged in a robbery – the charge could reasonably have been understood to have shifted the burden of proof on

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[11] Under South Carolina law, when the state seeks a murder conviction on a theory of accomplice liability, proof that the murder was an intentional or probable consequence of the underlying criminal scheme is an element of the offense. *State v. Peterson,* 287 S.C. 244, 247, 335 S.E.2d 800, 801-802 (1985).

the element of the offense that was most seriously contested at trial. Because, apart from the presumption, proof of that element was far from overwhelming, the State cannot carry its burden of demonstrating that the error was harmless beyond a reasonable doubt.

Contrary to the apparent view of the court below, the record leaves little doubt that the jury would have interpreted the instructions as requiring an assessment of Yates' state of mind, as opposed to that of Davis.[12] The judge began by reminding the jury that the State had charged *Yates* with having "committed the crime of murder." J.A. 95. The instruction immediately added that the State must "prove the killing of the deceased *by the Defendant*" with "malice aforethought." J.A. 96 (emphasis supplied). The charge's long definition of malice, which followed shortly thereafter, could easily have led a reasonable juror to believe that assessing the "Defendant['s] . . . malice aforethought" was central to the jury's decision in the case. Only once, at the very end of the malice instructions, did the judge even suggest that anyone else's state of mind could be at issue: he urged the

[12] It is not clear whether the South Carolina Supreme Court believed the jury to have been instructed to determine whether Davis acted with malice, or whether it simply considered the evidence that he did to be so convincing that such a jury determination was unnecessary. As will be seen momentarily, the first of these explanations for the state court's analysis is unsupported by the record. The second is impermissible as a matter of constitutional law. *Infra* at 32-34.

jury "to make a determination as to whether malice existed in the mind and heart of the killer at the time the fatal blow was struck." J.A. 96-97. This reference to an unidentified "killer" was at best oblique, however, since it followed the judge's instruction that the jurors were to decide whether the state had proved "the killing of the deceased by the Defendant . . . with malice aforethought," and his reminder that Yates was charged with "the unlawful killing of [a] human being." J.A. 95-96.[13]

Moreover, beyond this general direction to focus on Yates' state of mind, the charge strongly suggested that the question of whether Yates personally acted with "malice" was inextricably bound up with the central issue of the intended scope, or likely consequences, of the robbery – the threshold element for conviction as an accomplice. Thus, the court explained that under the law of accomplice liability, one "is not responsible for a homicide committed . . . as an independent act growing out of some *private malice* or ill will which the slayer had toward the deceased and which is not in furtherance of or connected with the original unlawful purpose" of the joint plan. J.A. 98 (emphasis added). A reasonable juror following this charge would have considered whether Yates so lacked

[13] No other portion of the court's instructions, moreover, even remotely suggested that the jury was concerned with the intent of anyone other than the defendant on trial. On the contrary, every other part of the charge, including the references to a deadly weapon in the armed robbery instructions, J.A. 95, and the discussion of malice in the charge on assault and battery with intent to kill, Tr. 1211-1212, focused the jury's attention on petitioner alone.

malicious intent that Davis' killing of Mrs. Wood reflected some "private" malice that he alone harbored. Conversely, given the general directions to focus on Yates' "malice," a reasonable juror could have concluded that a finding that Yates acted with malice was inconsistent with his claim that the murder was beyond the intended scope of the robbery. The likelihood that the jury understood the charge in that way was heightened by the prosecution's contention that Yates and Davis had intended from the outset to kill any witnesses to the robbery, J.A. 85-87, and by the prosecutor's argument that Yates' use of a pistol to shoot Willie Wood established his guilt of Mrs. Wood's murder because it showed that "[t]he malice required was in his heart." J.A. 83.[14] At the

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[14] While this statement by the prosecutor may not in itself prove that the jury also considered the "malice required" for murder to be petitioner's rather than Davis', it undeniably contradicts the state supreme court's assertion that "the element of malice relied on by the State is that of the killer, Henry Davis." J.A. 151. Whatever the merits of that assertion as an abstract proposition of South Carolina law, the jury's interpretation of its instructions is more likely to have been influenced by the statements of the prosecutor at trial than by the contrary assertions of the state supreme court more then eight years later. *Sandstrom v. Montana*, 442 U.S. 510, 516-517 (1979) (state supreme court is the final authority on state law basis of jury instruction, but not on jurors' likely interpretation of the instruction). *See also, California v. Brown*, 479 U.S. 538, 546 (1987) (O'Connor, J., concurring) (prosecutor's argument relevant to assessment of how jury might have interpreted instructions); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986) (prosecutor's argument relevant in assessing harmless-error claim).

very least, considering the malice instructions in the context of the charge as a whole and of the prosecutor's argument, a reasonable juror would have realized that Yates' state of mind before and during the robbery was relevant to whether homicide was a "probable and natural result" of the joint plan. J.A. 98.

Once it is understood that the jury's estimation of Yates' malice was crucial to the outcome of the case, the only remaining question is whether the evidence suggestive of such malice was so conclusive that the Court can find beyond a reasonable doubt that the jury would "have found it unnecessary to rely on the presumptions." *Pope v. Illinois*, 481 U.S. 497, 503, n. 6 (1987). On this record, the State cannot begin to make such a showing.

The evidence supporting the state's contention that Yates' original plan encompassed an intent to commit homicide was weak at best. In support of this contention, the prosecutor placed principal reliance on the fact that Yates had shot at Willie Wood before fleeing, and that both participants in the crime had carried weapons. J.A. 83-84. In addition, he contended that Yates' and Davis' failure to conceal their identities, and Davis' attempt to make Willie Wood lean over the counter, proved circumstantially that both men had planned from the start not to risk leaving any witnesses alive. J.A. 86-87. In response, Yates not only explicitly denied that he and Davis had planned to kill any witnesses, but also pointed to substantial circumstantial evidence to support that claim. In particular, it is undisputed that (1) Yates had fled the store, with three unspent rounds still in his pistol, Tr. 985, believing Mr. Wood to be still alive, J.A. 58, 82, and (2) that Yates withdrew after he heard a woman shout from

an adjoining office. Tr. 57, 61. A reasonable jury could have concluded that Yates' failure to carry out the alleged plan to kill all witnesses suggested that no such plan ever existed.

For similar reasons, the evidence on the closely related question of whether the homicide was a "natural and probable" consequence of the scheme was also far from overwhelming. To support its position, the state again relied on the fact that both participants had carried deadly weapons. But that, alone, is hardly conclusive – especially in light of the other circumstantial and direct evidence supporting the contention that Yates had never intended to kill the proprietors.[15] Moreover, because the jury was specifically directed to presume Yates' "malice" from proof that he possessed a gun, the prosecutor's reliance on the use of a gun served only to enhance the likelihood that the jury resorted to the impermissible presumptions in resolving this issue. *See* J.A. 156, *Yates v. Aiken*, ___ S.C. ___, 391 S.E.2d 530, 534-35 (1989) (Toal, J., dissenting) ("Merely possessing a gun, especially one which the jury knew Yates used to shoot Mr. Wood, would have been sufficient for the jury to conclude, by virtue of the erroneous instruction, that Yates had the

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[15] As the Court noted in *Enmund v. Florida*, 458 U.S. 782, 799-800 (1982), "only about one-half of one percent of robberies resulted in homicide" in the United States in a series of studies conducted throughout this century, and FBI crime statistics for 1980, the year before petitioner's offense, showed the homicide rate in robberies to be just 0.43 percent. *Id.* The jury's refusal to treat the plan to rob the Wood store as involving a "probable" homicide would thus have been quite consistent with society's actual experience with such crimes.

requisite intent to murder."). Under these circumstances, a reviewing court simply cannot find beyond a reasonable doubt that the jury would have found it unnecessary to rely on the improper instructions.

2. The Impermissible Instruction Also Undermined Yates' Contention that He Had Withdrawn from the Scheme by the Time of the Murder.

The burden-shifting instructions were prejudicial in a second respect as well. Under South Carolina law, even if a criminal scheme does include a plan to kill, a co-conspirator who withdraws from that scheme before a killing occurs may not be convicted of homicide as an accomplice. J.A. 24-25. A reasonable juror could well have interpreted the instructions on malice and withdrawal to require a determination of whether Yates still had the requisite "malice . . . in his heart" when he shouted, "Let's go!" and fled the store. Because such an interpretation would have been entirely reasonable in the context of the charge as a whole, the only remaining question is whether the unconstitutional instruction to presume Yates' malice was nonetheless legally superfluous – i.e., whether the other evidence at trial demonstrates beyond a reasonable doubt that Yates had not withdrawn from the scheme.

Here too, the evidence belies the contention that the error was harmless. Not only did the State fail to controvert Yates' evidence that he removed himself from the scene well before Mrs. Wood was stabbed, but nothing contradicts Yates' assertion that he fled before she even entered the room and *because* she had made known her

presence in the adjoining office. J.A. 57, 61. Further, Yates unequivocally communicated his withdrawal to Davis by shouting "Let's go!" *Id*. Nothing in the record suggests that Davis could not have fled along with Yates at that point. The fact that Davis chose not to leave with Yates might well have led a reasonable juror to conclude that Davis was, at least from that point forward, acting out of his own "private malice or ill will," J.A. 98, and not out of any shared intent to kill Wood or his mother. At the very least, the evidence of Yates' state of mind when he fled the store is sufficiently ambiguous that no reviewing court could conclude beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumptions in resolving the question of withdrawal. *Yates v. Aiken, supra*, 391 S.E.2d at 534-535 (Toal, J., dissenting); J.A. 156.

C. Under Either Interpretation of the Jury Verdict, The Improper Presumptions Cannot be Disregarded as Harmless Beyond A Reasonable Doubt

Recognizing that the impermissible presumptions might have affected the verdict in either or both of these ways – by undermining petitioner's contention that the murder was beyond the scope of the criminal plan and by eclipsing the claim of withdrawal – is crucial to the proper disposition of this case. The apparent view of the court below was that, even if the jury focused on Yates' malice and even if independent evidence of that malice was equivocal, the verdict should stand because: (1) the evidence of *Davis'* malice was overwhelming; (2) under South Carolina law, that malice should have been imputed to Yates; and that (3) Yates is therefore guilty of

murder beyond a reasonable doubt even if the presumptions did affect the jury's consideration of Yates' own state of mind.

For the reasons set forth above, any such assertion is patently without merit. Because of Yates' twin contentions that murder was outside the scope of the original scheme and that he had withdrawn – and the jury's possible confusion about the role of Yates' own malice in determining the merit of each of those claims – it is simply not possible to separate completely a conviction on the basis of accomplice liability from one in which Yates' state of mind (as informed by the presumptions) played a significant role. In other words, even if Davis' malice was proven overwhelmingly independent of the presumptions, the Court still cannot conclude beyond a reasonable doubt that conviction on an accomplice liability theory was unaffected by the illegal presumptions.

Moreover, the legal predicate of the lower court's reasoning is simply incorrect. In essence, its position was that the conviction should be affirmed on a theory of accomplice liability (which it assumed to be untainted by the presumptions) even though the jury might in fact have premised a verdict on the theory that Yates personally had the requisite malice to support the conviction (a theory that was undeniably tainted by the unconstitutional charge). Even if these two theories could be so neatly divided – which they simply cannot – that kind of post-hoc reconstruction of the evidence is constitutionally inappropriate on the facts presented here.

First, as a general proposition, a jury verdict that could be based on more than one ground must be set

aside if one of those grounds was prejudicially unconstitutional and the reviewing court cannot ascertain whether the jury relied on that ground. *Stromberg v. California*, 283 U.S. 359, 367-68 (1931). In other words, when a jury is presented with two alternative theories, one of which was infused with prejudicial error, the Court cannot find beyond a reasonable doubt that the error was not prejudicial.

Moreover, quite apart from the two defects in such a claim already discussed – the fact that Davis' malice was *not* overwhelmingly established, and that the unconstitutional instructions might well have relieved the state of its burden of proving Yates' mental state as an accomplice – this harmless-error argument contains an even more fundamental defect. This is that the essential element on which the argument rests – Davis' malice – was probably never found by the trial jury at all.

For the reasons set forth above, *supra* at 24-27, the most likely interpretation of the trial judge's instructions was that the jury had to determine whether "the Defendant," Yates, possessed the element of malice. While it is perhaps conceivable that the jury ignored both the thrust of the instructions and the prosecutor's argument to arrive at a unanimous determination of Davis' mental state at the time of the murder, the record provides little reason to accept such a supposition. Accordingly, the basis of the state's harmless-error analysis cannot be that the jury actually did find Davis to have acted with malice beyond a reasonable doubt. Rather, it is that the jury *would have* made such a finding, had it been clearly instructed to consider the issue.

Such an argument bears no resemblance to the type of harmless-error analysis which this Court's precedents authorize. The basis of this Court's decisions admitting of the possibility of harmless *Sandstrom* error is that even where the prosecution's burden of proof has been unconstitutionally lightened by an improper presumption, the jury has nevertheless performed its constitutionally-assigned function of finding each element of the offense charged. *Rose v. Clark*, 478 U.S. 570, 580-581 (1986). But where the jury's instructions did not plainly require it to make any finding at all concerning an essential element of the offense charged under state law, the fact that such a finding would have been supported by overwhelming evidence cannot save the conviction. This is so because, as is true of a directed verdict in favor of the prosecution, "the error in such a case is that the wrong entity judged the defendant guilty." *Id.*, 478 U.S. at 578.

The application of these principles here is a straightforward matter. As we have seen, the jury probably convicted Yates by concluding (with assistance from the unconstitutional presumptions) that *he* acted with malice. The state supreme court has now found him guilty on the basis of its conclusion that *Davis* acted with malice. That both findings involve "malice" cannot change the fact that they involve different people, and are thus quite different findings. A comparison to *Pope v. Illinois*, 481 U.S. 497 (1987) is instructive in this regard. Although Pope's jury was given a constitutionally invalid definition of an element of obscenity, the Court found that the instruction was susceptible of harmless error analysis. The basis of this holding was that the trial jurors in *Pope* "were informed that to convict *they must find* . . . that the

magazines petitioners sold were utterly without redeeming social value." 481 U.S. at 503 (emphasis supplied). The Court therefore concluded that the jury had fulfilled its constitutionally-assigned role of finding each element of the offense charged beyond a reasonable doubt. *Id.* But had the instructions in *Pope* authorized the jury to convict by considering the wrong magazines, no amount of evidence concerning the magazines which the jury should have considered could have rendered the error harmless. For in such a situation, it could not be said "that *the jury* has found . . . 'every fact necessary' to establish every element of the offense beyond a reasonable doubt." *Rose v. Clark, supra,* 478 U.S. at 581 (emphasis supplied) (quoting *In re Winship,* 397 U.S. 358, 364 (1970)).

In relying on the resolution of a factual issue – Davis' mental state – which the jury was never required to make, the South Carolina Supreme Court overlooked a fundamental principle of appellate review affirmed many times in this Court's decisions: "the question is not whether guilt may be spelt out of a record, but whether guilt has been found *by a jury* according to the procedures and standards appropriate for criminal trials." *Bollenbach v. United States,* 326 U.S. 607, 614 (1946) (emphasis supplied); *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572-573 (1977); *Carpenters v. United States,* 330 U.S. 395, 408-409 (1947). For this additional reason, the state court's denial of habeas corpus relief violated due process, and should at last be corrected.

D. Harmless-Error Analysis in *Sandstrom* cases Should Focus on Whether the Predicate Facts Triggering the Unconstitutional Presumption Proved the Elemental Fact Beyond a Reasonable Doubt

Finally, even if a reviewing court were to overlook the fact that Yates' jury probably never made *any* finding with respect to whether Davis acted with malice, petitioner submits, for the reasons stated by Justice Scalia in his concurring opinion in *Carella v. California,* ___ U.S. ___, 109 S.Ct. 2419, 2421 (1989), that harmless error analysis in *Sandstrom* cases such as this one should be limited to the determination of whether the predicate facts which were actually proven beyond a reasonable doubt so conclusively established the presumed fact that the jury may actually be said to have found " 'every fact necessary' to establish every element of the offense beyond a reasonable doubt." *Rose v. Clark, supra,* 478 U.S. at 580-81. In this case, the mere facts that a defendant used a deadly weapon and committed robbery – the predicate facts triggering the presumptions of malice – clearly do not in themselves establish malice beyond a reasonable doubt. Authorized to choose between evaluating the somewhat problematic evidence of malice on the one hand, and relying on legal presumptions of malice flowing automatically from undisputed predicate facts on the other, it is unlikely that petitioner's jury undertook the more difficult task of evaluating the evidence. *Sandstrom v. Montana,* 442 U.S. 510, 526 n. 13 (1979). Because it is at least reasonably possible that the jury took advantage of its authority to convict on the strength of the presumptions rather than the evidence, a reviewing court cannot say with any certainty " 'that the jury would have found it

unnecessary to reply on the presumption[s].' " *Rose v. Clark*, 478 U.S. 570, 583 (1986) (quoting *Connecticut v. Johnson*, 460 U.S. 73, 97 (1983) (Powell, J., dissenting)). Accordingly, the errors cannot be disregarded as harmless.

Petitioner acknowledges that the Court need not decide here the issue framed by Justice Scalia's *Carella* concurrence, since the result in this case would be the same under any interpretation of this Court's harmless-error precedents. He submits, however, that should the Court wish to consider the question posed by the *Carella* concurrence, the correct answer to that question provides yet another reason why the South Carolina Supreme Court's disposition of this case did not comport with due process.

CONCLUSION

The judgment of the South Carolina Supreme Court denying the petition for writ of habeas corpus should be reversed.

Respectfully submitted,

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